THE "AXEL MAERSK"; ATLAS ELECTRONICS (MAL.) SDN. BHD. v. M.V. "AXEL MAERSK", OWNERS & OTHERS INTERESTED

[O.C.J. (Rajah J.) November 28, 1980]

[Singapore — Admiralty in Rem No. 351 of 1978]

Shipping Law — Bill of Lading with notation CY/CY — Whether shipper could claim for damage to goods shipped.

The plaintiffs in this case claimed that under the Bill of Lading 249 cartons of clock radios and transistor radios were shipped on board the defendants' vessel "Axel Maersk" at Hong Kong. The said goods were alleged to be "in good order and condition" for carriage to Penang and delivery there. The plaintiffs claimed that the defendants as carriers were in breach of contract as they failed to deliver the said cargo in good order and condition and, instead, the cartons arrived damaged by sea water and/or fresh water. The plaintiffs suffered loss to the extent of M$57,137.05.

The defendants contended, *inter alia,* that the notation CY/CY on the face of the Bill of Lading precluded the bill from being *prima facie* evidence of the goods having been received on board in good order and condition.

Held, dismissing the plaintiffs' claim: (1) normally a plaintiff would rely on the Bill of Lading as *prima facie* evidence that the goods were received by the defendants in good order and condition. But in the instant case the plaintiffs could not call to their aid the Bill of Lading as it carried the notation CY/CY, and they had not called any evidence to prove that the cargo was "in good order and condition" at the time of shipment;

(2) on the balance of probabilities the damage took place some time after the container was off-loaded at Penang and before the surveyors were called in.

Case referred to:-

(1) *The "American Astronaut", Owners & Ors.* v. *Kian Hin Hang Pte. Ltd.* [1979] 2 M.L.J. 220.

ADMIRALTY *IN REM.*

C. Arul for the plaintiffs.

K.J. Prakash for the defendants.

Rajah J.: In this case the plaintiffs aver that under a Bill of Lading dated May 26, 1977 issued by or on behalf of the defendants, there were shipped on board the defendants' vessel, "Axel Maersk", at Hongkong 249 cartons of clock radios and transistor radios in good order and condition, for carriage for reward to Penang and delivery there in like good order and condition.

The plaintiffs further aver that, in breach of their duty as carriers and/or in breach of the contract contained in, or evidenced by, the said Bill of Lading, the defendants failed to deliver the said cargo in good order and condition, but delivered 169 of the said cartons damaged by sea water and/or fresh water and they have thereby suffered loss and damage to the extent of M$57,137.05.

The defendants, for their part, say that on the facts of the case, they are neither in breach of their duty as carriers nor in breach of the contract as alleged by the plaintiffs.

The defendants point to the notation CY/CY on the face of the Bill of Lading and say such a notation precludes the bill from being *prima facie* evidence of the goods having been received on board in good order and condition.

Further, the defendants contend that the said container was upon its discharge in Penang from the "Maersk Mondo", delivered into the custody of the Penang Port Commission on or about June 13, 1977 and kept in their open container yard. The plaintiffs took delivery of the container from the container yard on or about June 24, 1977 without any protest or comment by them on the good order and condition of the container (AB26). The defendants go on to say that if damage had been sustained by the container or its contents, the same was sustained after discharge of the said container at Penang and the defendants cannot be held liable for the same.

At the trial the parties agreed the following facts: —

1. The defendants delivered an empty container to shippers who loaded the container and sealed it and delivered the container, to the defendants in Hongkong for which defendants issued the Bill of Lading.
2. The container was delivered to defendants/agents in Hongkong; the date on which the container was delivered to the defendants and the date on which the container was loaded on the vessel are not known. Bill of Lading is dated May 26, 1977.
3. The container was carried on the defendant's vessel "Axel Maersk" from Hongkong to Singapore and unloaded in Singapore on May 30, 1977.
4. The container was stored at the Port of Singapore Authority's Marsilling yard in Singapore until May 11, 1977 when it was loaded on the defendant's vessel "Maersk Mondo".
5. The "Maersk Mondo" discharged the container in Penang into the Penang Port Commission's Butterworth Wharf on June 13, 1977.
6. The container was collected by the plaintiffs' agents, Kontena Nasional on June 24, 1977 and delivered to the plaintiffs' premises.

At the trial the Stowage Plan and Manifest of the "Axel Maersk" (the vessel that carried the container from Hongkong to Singapore) and the class certificate of the container were not available. The chemist concerned in the Survey Report on the damage to the goods did not give evidence.

On the Bill of Lading I accepted the evidence of Mohamed bin Hamzah, the Operations Engineer of the Maersk Line. He said,

"I am familiar with this form of bill of lading. On the face of it the shipper has shipped a container the cargo of which appears to be as stated therein. This is a CY/CY bill of lading (Container Yard/Container Yard). It is an FCL/FCL (Full Container Load). A CY/CY equates to an FCL/FCL. In this situation the container would belong to or be leased by the carriers. Maersk Line only undertakes to send an empty container to the shipper when the shipper himself will stuff the container without any representative from Maersk Line being present. We will also give one of the Maersk seals to the shipper. On completion of stuffing the shipper will seal up the container. From the shippers' premises to the ship is the responsibility of the shipper. From the quay side the container is loaded on to the ship. We ourselves would not know what the contents of the container are or the condition of the contents. We accept what is given by the shipper as the contents. Shipped in apparent good order and condition, this only refers to the container and not to what is inside it."

On the agreed facts and on the evidence as it fell it is clear (1) that, from the notation CY/CY the Bill of Lading covers the shipment of a container stuffed with goods by the shipper, (2) that the shippers prior to stuffing the container, were satisfied that it was free of defects and suitable for use, (3) that there was nothing wrong with the condition of the stuffed container when it was loaded on to the "Axel Maersk" in Hongkong, (4) that the carriers had not seen the contents of the container nor had they any knowledge of their condition at the time of its loading on the "Axel Maersk", (5) that the plaintiffs cannot rely on the Bill of Lading as *prima facie* evidence that the goods were received on board the "Axel Maersk" in good order and condition, and (6) that there is no positive evidence by the plaintiffs as to the good order and condition of the goods in the container when they were shipped on board "Axel Maersk".

Mr. Prakash, counsel for the defendants, urges me to follow the Court of Appeal decision in the case of *The "American Astronaut", Owners & Ors. Interested* v. *Kian Hin Hang (Pte) Ltd.*,[1] which relates to missing cartons stuffed in a container on the basis that the rationale behind that decision should apply equally in this case, which is one of damage to cartons stuffed in a container.

However, Mr. Arul, counsel for the plaintiffs, urges me not to be so persuaded. He asks me to find that the goods sustained damage after the container was loaded onto the "Axel Maersk" and before it was off-loaded from the "Maersk Mondo", the transshipment vessel from Singapore to Penang, on to the wharf of the Penang Port Commission for two reasons. (Both counsel are at one that damage to the goods, should it have happened after the container had been off-loaded in Penang, cannot be placed at the door of defendants). The first of such reasons is that the evidence, which the plaintiffs were seeking to obtain from the defendants with regard to the carriage of the container on the "Axel Maersk" namely the Stowage Plan and Manifest, was not made available to the plaintiffs and for that reason I should draw an adverse inference. He says that if the container had been carried on deck then the defendants would have been in breach of the contract of carriage and this would have disenabled the defendants from relying on the said notation CY/CY. The defendants' ability to resist the plaintiffs' claim he says could only arise on the basis that the container was not carried on deck. This knowledge was, in the circumstances, only within the knowledge of the defendants and therefore it was incumbent on them to produce the Stowage Plan and Manifest of the "Axel Maersk". He had no quarrel with the defendants on account of the "Maersk Mondo" as the Stowage Plan and Manifest had been made available. Hence the plea that I draw the adverse inference that had these two documents been produced it would have been seen that the container had been carried on the deck of the vessel which would have been a breach by the defendants of the contract of carriage.

He contends that, if on this issue I find in his favour then the matter would end here and now and his client would be entitled to succeed in his claim for damages. But if I don't, then on the second issue he asks me to say that the damage to the cargo took place because the container was leaking, if not from the time it was placed on board the "Axel Maersk", then at some time soon after such placement and before its off-loading on to the wharf of the Penang Port Commission.

On the issue of the carriage of the container on deck *Tetley* at page 323 of his book, Marine Cargo Claims (2nd Edition), has this to say,

> "Deck stowage cannot be considered proper stowage.... The proper interpretation of the Hague Rules is that deck carriage, without a statement to that effect on the face of the bill of lading, is such a breach of contract that the contract is void or voidable and the carrier cannot benefit under the contract or the Rules."

This issue, in my view, could only arise if the shipper can show that the goods were in the first instance shipped in good order and condition, but such is not the case here.

On the issue of the leaking container, the position here is that, on the facts and the law at the time the container was placed on board the "Axel Maersk" by the shippers, there was no leak in it.

However, Mr. Arul makes the point that the container was off-loaded in Singapore on May 30, 1977 and transhipped to Penang eleven days later. It is, he says, incumbent on the defendants to produce evidence as to what happened to the container in Singapore and that in this type of case where there is no direct evidence as to how damage occurred the burden is on the defendants to show that no damage could have taken place to the container from the time of loading in Hongkong to time of unloading at Penang.

In a case like this or for that matter, in any other case in similar circumstances, one goes back to the prime question, "What was the contract between the parties, was it breached and, if so, how".

The plaintiffs plead that under the Bill of Lading there were shipped on board the defendants' vessel "Axel Maersk" at Hongkong 249 cartons of clock radios and transistor radios *in good order and condition* for carriage, for reward, to Penang and delivery there *in like good order and condition*. The plaintiffs to succeed must therefore prove, amongst others, (1) that the goods at time of shipment in Hongkong was in good order and condition and (2) that at Penang the goods were *not in like good order and condition*. Normally a plaintiff would rely on the Bill of Lading as *prima facie* evidence that the goods were received by the defendants in good order and condition. But in the instant case the plaintiffs cannot call to their aid the Bill of Lading as it carries the notation CY/CY. And they have not called any evidence to prove that the cargo was in "good order and condition" at the time of shipment. It is not in dispute that the notation CY/CY on the Bill of Lading is properly part of the contract of carriage.

In the circumstances the plaintiffs have not proved that at the time of shipment the goods were in good order and condition. This in itself, I think, disposes of the plaintiffs' claim. On the further matter of

whether "the goods were not in like good order and condition" when being off-loaded at Penang, the plaintiffs sought to prove this by the evidence of PW1, the materials manager of the plaintiff company, and a Lloyd's Survey Report dated July 11 to which was attached a Chemist's Report dated July 8, 1977.

PW1's evidence was that the container was brought into the plaintiffs' yard from the container yard of the Penang Port Commission on June 24, 1977. At that time the container had no shippers' seal, it apparently having been broken by the Customs, but it had a customs seal. He himself was not present when the container was opened. He was, however, sent for soon after by the storekeeper who had opened the container, and it was then that he saw the damage to the goods. I found him and his evidence unsatisfactory. As for the Lloyd's Report, evidence was given by PW2, an employee of Trident Malaysia Sendirian Berhad, Surveyors and Lloyd's agents in Penang. He conducted the survey on June 25, 1977 at the plaintiffs' factory premises. The Report was signed not by PW2 but by the Administration Manager of the Company, which I found somewhat surprising, particularly as the survey was not conducted on the instruction and/or supervision of the person who had signed the Report. A further unsatisfactory aspect of the Survey Report was that no weight could be given to the Chemist's Report as the Chemist whom I would have thought was a most material witness was not called to give evidence. There was therefore no satisfactory evidence as to how the damage to the goods had been sustained. In the event, on a balance of probabilities the damage, in my view, took place some time after the container was off-loaded at Penang and before the Surveyors were called in on June 25, 1977.

This being the view I have taken of this case on yet another ground I must therefore dismiss the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Karthigesu & Arul; Drew & Napier.*

GOH YA TIAN v. TAN SONG GOU & ORS.

[A.C.J. (Lai Kew Chai J.) August 27, 1981]
[Singapore — District Court Appeal No. 82 of 1980]

Practice and Procedure — Agreed bundle of documents — Part of evidence before court — Admission without formal proof — Police reports in agreed bundle — Submission of no case to answer — Defendant put to election whether to call evidence or not — Negligence — Proof of — Res Ipsa Loquitur.

Tort — Negligence — Car hit from behind — Balance of probabilities.

This was an appeal from the decision of the learned Magistrate who dismissed the claim of the appellant for damages suffered by the appellant's taxi. At the trial an agreed bundle of documents and photographs was by agreement admitted into evidence. The bundle contained police reports of the driver of the taxi, the driver of the crane and the driver of the pick-up which were involved in the accident. From the reports it appeared that the taxi was hit in the rear by the pick-up when it was either stationary or was moving forward very slowly. It appeared also that the pick-up was knocked from behind by the crane. Only the appellant gave evidence at the trial and at the close of the appellant's case all three respondents submitted that there was no case for them to meet. They were put to an election by the learned Magistrate and they elected not to give evidence if the decision on the submission was against them. The learned Magistrate dismissed the claim of the appellant and he appealed.

Held: (1) the documents in the agreed bundle were admitted into evidence by consent without production of the maker or the originals and the contents formed part of the evidence before the court;

(2) the police reports in the agreed bundle formed part of the evidence adduced by the appellant at the trial and on the basis of those reports it must be found that the appellant's taxi was at the material time either stationary or was moving slowly ahead when it was collided into the rear portion by the pick-up;

(3) the balance of probabilities in this case was in favour of both the pick-up driver and the crane driver being negligent;

(4) if a judge is asked to rule at the end of the plaintiff's case that the plaintiff has made no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence.

Cases referred to:-

(1) *Yap Choo Hoo* v. *Tahir bin Yasin & Anor.* [1970] 2 M.L.J. 138.

(2) *Henry Trading Co. Ltd.* v. *Harun* [1966] 2 M.L.J. 281.

(3) *Baker* v. *Market Harborough Industrial Co-operative Limited* [1953] 1 W.L.R. 1472.

(4) *France* v. *Parkinson* [1954] 1 All E.R. 739.

(5) *U.N. Pandey* v. *Hotel Marco Polo Pte. Ltd.* [1980] 1 M.L.J. 4.

(6) *Simirah* v. *Chua Hock Lee & Anor.* [1963] M.L.J. 239, 241.

DISTRICT COURT APPEAL.

Joseph Gay for the appellant.

Simon Yuen for 1st respondent.

Tan Tee Jim for 2nd and 3rd respondents.

Cur. Adv. Vult.

Lai Kew Chai J.: This is an appeal against the decision of the learned Magistrate who dismissed the claim of the appellant for the sum of $1,132.20 being the agreed damages suffered by the appellant's taxi. The claim was against the 1st respondent as the owner and driver of motor pickup GF 6797 E. The 2nd respondent was sued as the registered owner of a trade plate bearing No. 0857 S which was attached to a motor crane bearing No. GS 13278. The motor crane was owned by the 3rd respondent and the appellant claimed that it was driven by one Abdullah bin Haji Bakar as the servant or agent of the 2nd or 3rd respondents.

Although the sum at stake is small, this appeal raises important questions as to the practice and evidential effect of documents which are agreed by parties in a litigation to be included in an Agreed Bundle, the court's application of the principles of logic and commonsense to circumstances surrounding a collision which do not infrequently arise and the practice of a trial judge before whom a submission is made that the plaintiff not having made out a case, the defendant has no case to answer.